Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd

SUPREME COURT (IPOH) — CIVIL APPEAL NO 03-12-93
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
20 JUNE 1994

Contract *— Formation — Letter — Whether concluded agreement — Whether 'subject to contract' — Intention of parties — General rule — Whether merely a letter of intent*

Contract *— Quantum meruit — Building contract — Pre-contractual expenses — Expenses incurred in reliance of contract — Work done with knowledge of defendant*

The respondent, YC Chin Enterprises Sdn Bhd ('YC Chin'), had entered into negotiations to construct low-cost houses and shophouses ('the project') for the workers of the appellant, Ayer Hitam Tin Dredging Malaysia Bhd ('AHTD'). AHTD wrote a letter to YC Chin on 19 September 1984 ('the letter'), accepting their proposals in respect of the project, subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be constituted in an agreement between YC Chin and AHTD and that appropriate indemnity clauses in favour of AHTD be incorporated in the agreement.

In reliance upon the letter, YC Chin proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Subsequently, AHTD instructed YC Chin to cease all work, stating their intention to discontinue negotiations and that any work done had been entirely at YC Chin's risk. AHTD contended that the work had been done before the coming into being of any contract and that the letter was part of ongoing negotiations for a future agreement. On the other hand, YC Chin submitted that all essential terms had been agreed and all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed YC Chin's claim for breach. AHTD appealed.

The primary issue was whether there was a concluded contract between the AHTD as employer and YC Chin as contractor.

Held, allowing the appeal:

(1) The existence of an agreement depends upon the intention of the parties, who must be ad idem. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.

(2) Merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before the formal contract is signed.

However, when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged.

(3) Having regard to the fact that the letter did not contain details such as what 'the appropriate indemnity clauses' were, together with its vital qualifying clause, 'subject to the following terms and conditions', the present case fell within the principle in *Crossley v Maycock*[17] that if an agreement is made subject to certain conditions, then until those conditions are accepted, there is no enforceable final agreement.

(4) On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a letter of intent, ie an expression in writing of a party's present intention to enter into a contract at a future date.

(5) Since the plaintiff had commenced the preliminary works, with the knowledge but not necessarily the consent of the defendant, the liability of the defendant would be on a quantum meruit basis not exceeding RM300,000, having regard to para (v) of the letter.

Obiter:

The proposition in *Kam Mah Theatre Sdn Bhd v Tan Lay Soon*[11] must be read keeping in mind the vital qualifying clause there that the so-called deposit fell to be refunded if no agreement was signed. It does not detract from the principles that: (i) an informal contract without any express details may be binding; (ii) a bargain with essential terms, though a formal document is to be drawn up with further terms, is still a bargain; and (iii) where there is a definite and complete agreement, the reservation in respect of a formal document only means that it should be put into proper shape and in legal phraseology with any subsidiary terms necessary for insertion in a formal document.

[Bahasa Malaysia summary

Responden, YC Chin Enterprises Sdn Bhd ('YC Chin'), telah mengadakan perundingan untuk membina rumah dan rumah kedai kos rendah ('projek itu') untuk pekerja perayu, Ayer Hitam Tin Dredging Malaysia Bhd ('AHTD'). AHTD telah menulis sepucuk surat kepada YC Chin pada 19 September 1984 ('surat itu'), untuk menerima cadangan mereka berkenaan dengan projek itu, tertakluk kepada beberapa terma dan syarat, satu daripadanya adalah bahawa terma dan syarat di dalam surat itu mesti dimasukkan di dalam suatu perjanjian di antara YC Chin and AHTD dan bahawa perjanjian itu mesti mengandungi fasal tanggung rugi yang sesuai yang memihak kepada AHTD.

Bergantung pada surat itu, YC Chin telah bermula menjalankan beberapa daripada obligasi yang dinyatakan di dalam surat itu,

walaupun perjanjian bertulis yang rasmi tidak disempurnakan. Kemudiannya, AHTD telah mengarahkan YC Chin supaya menghentikan semua kerja, dan menyatakan tujuan mereka untuk menamatkan perundingan mereka dan bahawa sebarang kerja yang dilakukan adalah atas risiko YC Chin sepenuhnya. AHTD menegaskan bahawa kerja itu telah dilakukan sebelum sebarang kontrak diwujudkan dan bahawa surat itu merupakan sebahagian daripada perundingan yang masih diadakan untuk suatu kontrak yang akan diikat pada masa hadapan. Sebaliknya, YC Chin berhujah bahawa semua terma yang penting telah dipersetujui dan apa yang tinggal untuk dilakukan hanyalah untuk menyusun terma itu di dalam bentuk suatu kontrak. Hakim perbicaraan telah memutuskan bahawa terdapat suatu kontrak dan telah membenarkan tuntutan YC Chin untuk kemungkiran kontrak. AHTD telah membuat rayuan.

Isu utama adalah sama ada suatu kontrak telah diikat di antara AHTD sebagai majikan dan YC Chin sebagai kontraktor.

Diputuskan, membenarkan rayuan itu:

(1) Kewujudan suatu perjanjian bergantung kepada niat pihak-pihak, yang mesti berfikiran ad idem. Ia boleh diinferenskan daripada bahasa yang digunakan, kelakuan pihak-pihak itu memandangkan keadaan sekeliling dan matlamat kontrak itu. Mahkamah secara amnya akan memakai ujian objektif ataupun ujian orang waras.

(2) Hanya kerana pihak-pihak itu memikirkan tentang persiapan suatu kontrak rasmi, itu tidak menghalang kewujudan suatu kontrak yang mengikat pihak-pihak itu sebelum kontrak rasmi itu ditandatangani. Bagaimanapun, apabila sesuatu kontrak dibuat 'tertakluk kepada kontrak' ('subject to contract') atau 'tertakluk kepada persiapan dan kelulusan suatu kontrak rasmi' ('subject to the preparation and approval of a formal contract'), itu secara amnya akan ditafsirkan supaya bermakna bahawa pihak-pihak itu masih mengadakan perundingan dan tidak berniat untuk diikat sehingga suatu perjanjian rasmi ditukarkan.

(3) Dengan mempertimbangkan hakikat bahawa surat itu tidak mengandungi butir-butir mengenai apakah 'fasal tanggung rugi yang sesuai' itu, bersama dengan fasal pembatasan penting 'tertakluk kepada terma dan syarat yang berikut' itu, kes ini jatuh di bawah prinsip *Crossley v Maycock*[17] bahawa sekiranya sesuatu perjanjian dibuat tertakluk kepada syarat tertentu, tidak ada perjanjian yang boleh dikuatkuasakan sehingga syarat itu diterima.

(4) Atas pentafsirannya yang sebenar, surat itu tidak merupakan suatu kontrak yang mengikat di sisi undang-undang tetapi hanya merupakan suatu rekod terma yang dipersetujui sebagai asas perundingan suatu kontrak. Ia merupakan suatu surat niat (letter of intent), iaitu suatu penyataan bertulis tentang niat masakini sesuatu pihak untuk mengikat suatu kontrak pada masa akan datang.

(5) Oleh kerana plaintif telah memulakan kerja persediaan itu dengan pengetahuan tetapi tidak semestinya persetujuan defendan, liabiliti defendan adalah atas dasar quantum meruit yang tidak melebihi RM300,000, memandangkan perenggan (v) surat itu.

Obiter:

Saranan di dalam *Kam Mah Theatre Sdn Bhd v Tan Lay Soon*[11] mesti dibaca dengan mengingati fasal pembatasan penting di sana bahawa deposit konon itu mesti dipulangkan jika tidak ada perjanjian yang ditandatangani. Ia tidak menjejaskan prinsip bahawa: (i) suatu kontrak yang tidak rasmi tanpa sebarang butir nyata boleh mengikat kedua-dua pihak; (ii) suatu persetujuan dengan terma yang asas, walaupun suatu dokumen rasmi akan disiapkan dengan terma tambahan, masih merupakan suatu persetujuan; dan (iii) di mana terdapat suatu persetujuan yang tetap dan lengkap, pembatasan berkenaan dengan dokumen rasmi itu hanya bermakna bahawa ia mesti disusun di dalam bentuk yang betul dengan menggunakan istilah undang-undang serta sebarang terma subsidiari yang perlu dimasukkan di dalam suatu dokumen rasmi.]

Notes

For cases on the formation of contracts, see 3 *Mallal's Digest* (4th Ed) paras 1104–1141; [1992] Mallal's Digest 574–575.

For cases on quantum meruit, see 3 *Mallal's Digest* (4th Ed) paras 1386–1389; [1991] Mallal's Digest 772.

Cases referred to

1 *Smith v Hughes* (1871) LR 6 QB 597; [1861–73] All ER Rep 632 (refd)
2 *Vitol BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 (folld)
3 *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 (refd)
4 *Branca v Cobarro* [1947] KB 854; [1947] 2 All ER 101 (refd)
5 *Rossdale v Denny* [1921] 1 Ch 57; (1921) 90 LJ Ch 204 (refd)
6 *Winn v Bull* (1877) 7 Ch D 29 (refd)
7 *Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark* [1975] 2 All ER 416 (refd)
8 *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545; [1985] 1 WLR 721 (refd)
9 *Filby v Hounsell* [1896] 2 Ch 737 (refd)
10 *Chinnock v Ely (Marchioness)* (1865) 4 De GJ & Sm 638; 12 LT 251 (folld)
11 *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 (refd)
12 *Quinn v Leathem* [1901] AC 495 (folld)
13 *Masters & Anor v Cameron* (1954) 91 CLR 353 (refd)
14 *Cavallari v Premier Refrigeration Co Pty Ltd* (1952) 85 CLR 20; 26 ALJ 187 (folld)

15 *Love & Steward Ltd v Instone (S) & Co Ltd* (1917) 33 TLR 475 (folld)
16 *Harichand v Govind Luxman Gokale* (1922) LR 50 IA 25 (folld)
17 *Crossley v Maycock* (1874) 43 LJ Ch 379; (1874) LR 18 Eq 180 (folld)
18 *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20 (folld)
19 *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* (1983) 24 BLR 94; [1984] 1 All ER 504 (folld)

Appeal from: Civil Suit No S6–22(23)–295–1988 (High Court, Kuala Lumpur)

Su Tiang Joo (*Teh Meng Teck* with him) (*Cheah Teh & Su*) for the appellant.
RR Sethu (*Khoo Eng Chin* with him) (*Khoo & Sidhu*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): The primary issue which arises for decision in this appeal is whether there was a concluded contract between the appellant as employer and the respondent as contractor, to construct and develop low-cost houses and shophouses for the appellant's workers, in the Mukim of Dengkil, the District of Sepang, State of Selangor.

The appellant, who was the defendant in the court below, is a public limited company incorporated in Malaysia with its registered office at 16, Jalan Tangsi, Kuala Lumpur.

The respondent, who was the plaintiff in the court below, is a private limited company incorporated in Malaysia with its principal place of business at 448, Jalan Pudu, Kuala Lumpur, carrying on the business of building and general contractors.

It would be more convenient to refer to the appellant and the respondent as the defendant and the plaintiff, respectively.

The record provided shows that in March 1981, the plaintiff had entered into negotiations with a third party, Malaysia Mining Corp Bhd ('MMCB'), a majority shareholder of the defendant, to develop and construct low-cost houses and shophouses for the defendant's workers hereinbefore mentioned ('the project'). So far as the defendant was concerned, the project was non-profitable. By September 1984, the defendant's board of directors being agreeable to the plaintiff's proposals, the secretary of the defendant wrote a letter dated 19 September 1984 addressed to the plaintiff ('the letter of 19 September 1984') in the following terms:

> Dear Sirs
>
> Ayer Hitam Tin Dredging Malaysia Bhd (AHTB) Workers' Housing Scheme
>
> We refer to the above subject and are pleased to advise that your proposals for the implementation of the housing scheme are agreeable to the board of directors of the company, subject to the following terms and conditions:

A (i) that the project shall be on a turnkey basis;
(ii) that the design and selling prices of the individual units shall be as approved by the Jawatankuasa Tetap Kebajikan Pekerja-Pekerja Ladang dan Lombong Selangor;
(iii) that YC Chin Enterprises shall arrange for end financing of the project;
(iv) payments to YC Chin Enterprises shall be made at stages of completion in
B accordance with the payment schedule as agreed between the end financier and YC Chin Enterprises and that AHTD [the plaintiff] shall not be liable for any progress payment;
(v) the filling and levelling of the site shall be carried out by YC Chin Enterprises for which AHTD undertakes to pay a sum not exceeding RM300,000 towards the cost of this work;
C (vi) that the above terms and conditions be constituted in the form of an agreement between YC Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated into the said agreement.

D A copy of the draft agreement will be forwarded to you in due course for your perusal.

We trust that the above are in order and should you agree to the above terms and conditions, kindly sign the duplicate copy of this letter and return to us as soon as possible.

Yours faithfully
E Ayer Hitam Tin Dredging Malaysia Bhd
—Sgd—
Secretary

In reliance upon the letter of 19 September 1984, the plaintiff had proceeded to make arrangements for end financing for the project and had also
F commenced preliminary works on the site, for which purpose, architects, engineers and surveyors were appointed. This, they did, although no formal agreement in writing had been executed but in the confident belief that the letter of 19 September 1984 constituted a binding contract.

However, although a copy of the draft agreement referred to in the letter of 19 September 1984 was, in due course, forwarded to the plaintiff for
G their approval, no such approval was forthcoming, much less any agreement signed, and as late as November to December 1986, the contemporary correspondence passing between the plaintiff and MMCB indicated clearly that negotiations as to the terms of the agreement, including the price, were still in progress.

H For the sake of elucidating the issues which arise for decision regarding this part of the case, we must now refer to the contemporary correspondence passing between the parties showing what they say.

First of all, we should like to refer to MMCB's letter dated 25 November 1986 addressed to the plaintiff asking the plaintiff to consider absorbing certain costs to be incurred in connection with the project, which reads as
I follows:

Dear Sirs

Ayer Hitam Tin Dredging Malaysia Bhd
Payment of survey fees

We have a copy of your letter dated 13 November 1986 addressed to the mine manager requesting that arrangements be made to collect relevant fees from the participants.

It is in no doubt that the memorandum of understanding specifies that payments under items 1–7 of your letter are to be borne by the participants. However, we do feel that you would favourably consider absorbing these costs based on the following:

(1) Concessions have been made by the Government for this project in particular the payment of plan fees which has been exempted. Other low-cost housing projects do not enjoy such concessions.

(2) The selling price of the houses are pegged at RM25,000 as against RM24,000 at Sungei Besi Mines. No doubt the higher selling price takes into account the remoteness of the project. We have to remind you that if the total cost to the participants exceeds RM25,000 then the EPF may not consider this to be a 'low-cost project'. This has been confirmed by the EPF representatives.

(3) In addition to the above, the company will be contributing RM300,000 towards the site preparation cost. This represents a bonus to you.

(4) The general trend in the construction industry at present is that building costs have somewhat slid lower and that there have been representations by the Mine Housing Committee for a review of the selling price. If this request is made to the participants it will aggravate the situation.

You will no doubt agree that this project is exceptional in nature in that the aforementioned concessions have been granted unlike other low-cost projects. As a matter of guide a low-cost project at the 16th milestone of Puchong was sold at between RM17,000 and RM18,000 inclusive of land cost.

In view of the foregoing we suggest that you review the position and hope that you would be prepared to absorb the survey fees, etc.

Your consideration in this matter will be highly appreciated.

Yours faithfully
Malaysia Mining Corporation Bhd
—Sgd—
Zulkifli Talib
Group property development manager

Next, the plaintiff replied to MMCB by letter dated 12 December 1986, declining to absorb the costs referred to in MMCB's letter, and making certain counter-proposals as follows:

Dear Sirs

Ayer Hitam Workers' Housing Scheme
Payment of survey fees

We refer to your letter dated 25 November 1986 pertaining to the above and wish to clarify our points of view as follows:

(1) Firstly, we are not involved in the land survey and issue of land titles. In accordance with the memorandum of understanding, the local Land Office is to undertake the land title survey, planting of boundary stones and issue of titles. The participants are obliged to pay to Jabatan Tanah a sum of ⅔ of the prescribed rate as in the case of Sungei Besi Mines Workers' Housing Scheme.

However to assist the participants to obtain their individual titles at an earlier date and with the mutual understanding with Pejabat Tanah we offer

to appoint a licensed surveyor to undertake the title survey work by paying the full rate to the Survey Board and subsidizing ⅓ the difference from our own resources.

The titles will be issued in the names of individuals and we have no control of them.

We see no reason to absorb the costs of survey fees and boundary stones. In addition it might create unnecessary repercussion to other project(s) thus hampering the progress of this and other schemes.

(2) The cost of houses as pegged at RM25,000 has been going through a long process by our submission of price(s) for your consideration, acceptance of the same by the participants and approval by the Task Force Committee.

The latest instance of request by former buyers of PKNS houses to reduce the price which has been immediately rejected by the State Government of Selangor should be taken as a typical example that the principles when accepted/committed should always be adhered to. Otherwise an agreement will no more be an agreement.

Casually we have checked the price of low-cost projects as quoted in your above letter and found that at 14th milestone of Puchong, low-cost flats of the 2-bedroom type have been built by the State Government for sale. The type of houses of the two projects are not comparable.

(4) Because of the current slow-down of our country's economy the general impression is that 'the building costs have somewhat slid lower'. It is true that the construction industry is dull. Selling prices of shophouses, office spaces, medium and high-cost houses have been slashed by 15% to 25%. But it is not quite the case in low-cost houses. The prices of cement and steel remain unchanged. Some other materials such as roofing tiles and adjustable louvres have even gone up because of market control and Japanese Yen appreciation. There is no labour shortage however wages of building workers have not come down.

Notwithstanding what has been stated above we wish to offer herewith the following:

(a) The participants have to pay survey fees of RM134 each plus RM20 for boundary stone fees for intermediate lots and RM25 each per corner lot. They will get their titles in return.

(b) We offer our assistance to appoint a licensed surveyor to undertake the survey work and ensure that individual titles will be made available for end finance loans as soon as possible.

(c) Upon completion of the project and before the houses are handed over to individual participants we will credit the sum of survey fees paid previously to the participants and the sum will be utilized as deposits and connection fees, if any, for application and installation of meters of electricity and water supply. Should the amount of survey fees fall short of the cost of deposits/connection fees, the participants shall cover the deficit, otherwise, the balance will be refunded to the individual.

This offer is a bonus to the participants who have remitted their progressive payments promptly during the course of construction and is not an obligation from the contractor.

We trust that you will find our offer reasonable and fair.

Thank you.

Yours truly
YC Chin Enterprises Sdn Bhd

—Sgd—
KC Chin
Managing Director

Apparently, the counter proposals aforesaid were not acceptable to MMCB for, by a letter dated 5 August 1981, the plaintiff wrote to the defendant complaining that the formal master agreement in respect of the project had not been executed by the defendant and warning it of the consequences of delay in the execution thereof in the following terms:

Dear Sirs

Ayer Hitam Tin Mines Workers' Housing Scheme

We refer to our letter dated 5 August 1987.

To date, we have yet to receive from your office the formal master agreement to be executed between Ayer Hitam Tin Dredging Malaysia Bhd and YC Chin Enterprises Sdn Bhd in respect of the above-mentioned project. The circumstances being such, we must draw your attention that the delay of execution of the aforesaid agreement shall render us incapable of continuing to implement the housing development successfully.

We would also like to draw your attention that should there be an increase in prices for building materials and labour wages in future due to further delay to commence construction work, YC Chin Enterprises Sdn Bhd shall reserve the right to claim variation for additional cost in building materials, labour wages and any liability whatsoever arising thereof.

Yours faithfully
YC Chin Enterprises Sdn Bhd
—Sgd—
Chia Ping Yue
for Managing Director

That letter evoked a reply dated 11 August 1987 from the defendant to the plaintiff, calling for a discussion as the defendant was in the process of re-evaluating the project, and was as follows:

Dear Tuan Haji

Workers' House Ownership Scheme for Ayer Hitam Tin Mine Workers

Thank you for your letter dated 6 August 1987 on the above-mentioned project.

As was briefed to you in our meeting on 5 August 1987, I would like to reiterate again that our Board is now in the process of re-evaluating the whole scheme. This would include rearrangement of the end financing as well as the renegotiation of the terms of the contract work.

We would be pleased and appreciate it if you could meet us and discuss your proposal as soon as possible.

Thank you.

Yours faithfully
Ayer Hitam Tin Dredging Malaysia Bhd
—Sgd—
Dr Abdul Razak bin Abdul
Director

The plaintiff declined the request for discussions.

The defendant then by a letter dated 27 August 1987 addressed to the plaintiff, instructed the plaintiff to cease all work; that letter was in the following terms:

> Dear Sirs
>
> Workers' House Ownership Scheme for Ayer Hitam Tin Mine Workers
>
> We refer to your letter dated 18 August 1987. We find your uncompromising and intrasigent attitude unfortunate and foresee future problems were we to work together.
>
> We refer yourselves to our letter of 17 December 1986, wherein we have informed you that your proposals for the implementation of the above housing scheme is subject to a formal contract to be drawn up and agreed upon between the parties. In the light of your unwillingness to agree to our mutual terms and benefits we can only assume that it is best that we do not continue our negotiations any longer.
>
> In this event, please note than any administrative and construction work done for the above scheme is entirely at your own risk.
>
> Yours faithfully
> Ayer Hitam Tin Dredging Malaysia Bhd
> —Sgd—
> Dr Abdul Razak bin Abdul
> Director

The case for the defendant, both here and in the court below, was that appointments and preliminary works had been done before the coming into being of any contract and, that too, upon the instructions of the plaintiff only. That being the case, it was submitted that the plaintiff did so, not upon reliance of the alleged contract, but in anticipation and in order to secure the project from the defendant. The letter was, therefore, part of ongoing negotiations or an agreement to agree on a future agreement which would be prepared by the defendant's solicitors and the terms of which were yet to be agreed upon by the parties — so it was said.

To emphasize the point, it was pointed out that the draft master agreement prepared by Messrs Rashid & Lee, solicitors for MMCB, sometime in 1986, had not been signed as the parties could not agree on the terms thereof.

On behalf of the plaintiff, it was submitted that all essential terms had been agreed, the parties had intended to assume and had assumed presently enforceable obligations, and that all that remained to be done was to put these terms into the form of a contract. The defendant's contention requires reading the words 'subject to contract' into the letter of 19 September 1984, when they are in fact not there — so it was said.

Broadly stated, the result of this appeal depends upon the answer to the question whether, having regard to the circumstances outlined above, the letter of 19 September 1984 embodies any contractual obligations between the parties.

In *Smith v Hughes*[1] it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them.

But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.

In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

As clear and helpful an enunciation of the principles as any which should guide the court in determining the ever-recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol BV v Compagnie Europeene des Petroles*[2] at p 576 in the following words:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

In the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14m, would be properly documented.

In the second place, turning to the letter of 19 September 1984, nowhere in it is there anything said as to:

(1) when work on the project would commence or be completed; consequently, the ascertainment of damages for late delivery would become difficult. Similarly, the ascertainment of the defect liability period would also be difficult;
(2) what were the terms of 'the appropriate indemnity clauses' in favour of the defendant referred to in cl (vi) of the letter of 19 September 1984 — a matter of no little importance to the defendant bearing in mind that so far as it was concerned, liability was being incurred in respect of a not insubstantial sum of money and the project was non-profitable;
(3) what the price of the individual units of dwelling houses would be, though it did say that this would have to be approved by the Jawatankuasa Tetap Kebajikan Pekerja-Pekerja Ladang dan Lombong Selangor;

(4) the number of dwelling houses and shophouses to be constructed and where the dwelling houses were to be constructed; and
(5) the identity of the purchasers of the dwelling houses.

Moreover, it was most material to the point at issue that the letter of 19 September 1984 contained the following qualifying clause in the opening paragraph:

> We refer to the above subject and are pleased to advise that your proposals for the implementation of the housing scheme are agreeable to the board of directors of the company, *subject to the following terms and conditions* ... (emphasis added),

one of which was as follows:

> ... the above terms and conditions be constituted in the form of *an agreement* between YC Enterprise Sdn Bhd and Ayer Hitam Tin Dredging Malaysia Bhd and that *appropriate indemnity clauses* in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated into the said agreement. (Emphasis added.)

It will also be recalled that although the letter of 19 September 1984 stated that a copy of the draft agreement would be forwarded by the defendant to the plaintiff no such draft was ever forwarded.

True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v Alexander*[3] at pp 288, 289 where the court said this:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

In *Branca v Cobarro*,[4] the agreement entered into by the parties contained a clause as follows: 'This is a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed.' It was held by the Court of Appeal that a binding agreement had come into effect.

But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v Denny*[5]) or 'subject to the preparation and approval of a formal contract' (see *Winn v Bull*[6]) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to

prevent the formation of a contract. (See, for example, *Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish Southwark*,[7] *Alpenstow Ltd v Regalian Properties plc*,[8] *Filby v Hounsell*.[9]) A

We hasten to add, however, that in both *Richards*[7] and *Alpenstow*[8] the court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time-honoured expression 'subject to contract'. Indeed, in *Chinnock v Ely (Marchioness)*[10] at p 646, Lord Westbury said this: B

> ... if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. C

We must next refer to the recent decision in *Kam Mah Theatre Sdn Bhd v Tan Lay Soon*[11] cited to us, for the proposition, inter alia, that the making of a sale and purchase agreement to also include 'other usual terms and conditions' remained largely a matter of conjecture and creates uncertainty. In this context, we have reminded ourselves of the much-quoted observations made by Lord Halsbury in *Quinn v Leathem*[12] at p 506 that: D

> ... every judgment must be read as applicable to the particular facts proved, ... since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ... a case is only an authority for what it actually decides. E

Thus, the proposition in the *Kam Mah Theatre* case[11] to which we have referred, must be read subject to the consideration that in that case the alleged agreement comprised in a letter in respect of which specific performance had been sought, contained the vital qualifying clause: F

> ... provided that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989 otherwise the aforesaid sum of RM90,394.20 (equivalent to 5% of the purchase price) shall be refunded to you free of interest without demand forthwith ...

In the event, pursuant to the qualifying clause in the letter, the so-called deposit fell to be refunded to the purchaser as no sale and purchase agreement was ever signed. In such a situation, the High Court of Australia in *Masters & Anor v Cameron*[13] — an authority uncovered in the final stages of the preparation of this judgment — we would interpolate, said this: G H

> ... From the fact that a so-called deposit was paid upon the signing of a document which left each party free to decide against entering into a binding contract the prima facie inference is that the intention was to provide a sum which should take on the character of a deposit upon the making of a contract, but in the meantime should not become the property of the intending vendor.

For the avoidance of doubt, however, we would add that the proposition in the *Kam Mah Theatre* case[11] should not be construed as detracting from certain well-known principles enunciated in three cases to which we shall now refer, namely, *Cavallari v Premier Refrigeration Co Pty Ltd*,[14] *Love &* I

Steward Ltd v Instone (S) & Co Ltd[15] and *Harichand v Govind Luxman Gokale.*[16]

In *Cavallari*[14] the High Court of Australia said this at p 25:

> ... while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance.

Similarly, in *Love & Stewart*,[15] Lord Loreburn said this at p 476:

> It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. *If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain.* But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition remained unfulfilled. (Emphasis added.)

Another illustration of what Lord Loreburn had in mind may be found in the Indian Privy Council case of *Harichand*[16] when Mr Ameer Ali, speaking for their Lordships of the Board said this at p 31:

> ... Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, *with any subsidiary terms that the vakil might consider necessary for insertion in a formal document.* (Emphasis added.)

Having said that, however, we consider that the case which is especially relevant to the facts and circumstances of the present appeal is *Crossley v Maycock*[17] where Sir George Jessel MR said:

> If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce.

In the present appeal, it is important to note the opening para in the letter of 19 September 1984, containing as it does the vital qualifying clause: 'subject to the following terms and conditions', and, in particular, condition (vi) which states quite categorically:

> ... that the above terms and conditions in the form of an agreement between YC Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated in the said agreement.

In our view, having regard to the several essential matters which still remained to be settled between the parties to which we have referred and

the letter of 19 September 1984 with its vital qualifying clause, 'subject to the following terms and conditions', one of which was condition (vi) aforesaid, the present case falls within the principle enunciated by Sir George Jessel MR in *Crossley v Maycock*.[17]

It follows that the letter of 19 September 1984 on its true construction did not constitute a contract binding in law upon the plaintiff and the defendant but was only a record of terms upon which they were agreed as a basis for the negotiations of a contract. It may aptly be called a letter of intent, the characteristics of which have been accurately described by Fay J at first instance in his judgment in *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd*[18] at p 22 para 3 thus:

> As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect.

Later, in his judgment, he restated this proposition (at p 22 para 4) thus:

> A letter of intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.

We would add that we have not overlooked the fact that the plaintiff had, after the receipt of the letter of 19 September 1984, conducted itself as if it considered that a contract binding in law had been concluded, as evidenced by the steps it had taken in that direction to which we have referred. However, this does not really assist in deciding the question of construction of the letter of 19 September 1984 for reasons we now give.

Looking back, our analysis of the factual matrix in the present appeal is that both the plaintiff and the defendant were optimistic about a formal contract being executed pursuant to the letter of 19 September 1984 and, so, to expedite performance under that contract, the plaintiff, with the knowledge, though not necessarily at the request of the defendant, had commenced the preliminary works hereinbefore mentioned.

The liability of the defendant to the plaintiff in respect of the execution of such preliminary works would, therefore, be on a quantum meruit basis and, provided always, that such liability shall not exceed the sum of RM300,000, having regard to para (v) of the letter of 19 September 1984. The authority which we should like to refer to in support of this conclusion is *British Steel Corp v Cleveland Bridge & Engineering Co Ltd*[19] (at p 121 last para to p 122 para 1) where Robert Goff J (as he then was) said this:

> In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter — as anticipated — a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request,

such an obligation sounding in quasi-contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, eg preparatory work which will, if the contract is made, be allowed for in the price of the finished work (cf *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932). This solution moreover accords with authority, eg the decision in *Lacey v Davis* (above); the decision of the Court of Appeal in the unreported case of *Sanders & Forster Ltd v A Monk & Co Ltd* (6 February 1980), though that decision rested in part on a concession; and the crisp dictum of Parker J in *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211 at p 214, when he said of a letter of intent that 'its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction' contained in the letter.

The judge should, therefore, have dismissed the plaintiff's claim for general and special damages for breach of contract and interest on such damages as there never was a concluded contract entered into by the parties.

However, as we have indicated, a claim by the plaintiff on a quantum meruit basis for the preliminary works on the site hereinbefore mentioned, which was made by way of alternative in the statement of claim, will lie, though liability in respect thereof must not exceed RM300,000, for the reason stated. We would, therefore, remit this last mentioned aspect of the case to the judge for assessment and for an order for payment of the sum found due on such assessment.

The result, therefore, is that this appeal succeeds, and must therefore be allowed. The judgment of the court below is set aside. Costs here and below to the defendant. The deposit must be refunded to the defendant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim